Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 84-1990

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

DONALD E. JOHNSON, JR..

Petitioner

v.

RANDALL EDWARD REX,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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BEST AVAILABLE COPY

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OPINION BELOW

The decision of the United States Court of Appeals for the Tenth Circuit is reported at 753 F.2d 840.

Although Respondent would agree that the United States District Court granted summary judgment in favor of Petitioner on March 12, 1980, Respondent would submit that Exhibit B does not contain the relevant portions of that order.

JURISDICTION

Respondent agrees with the statement of jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent agrees with the statement of Constitutional and statutory provisions cited by Petitioner.

STATEMENT OF THE CASE

A. Procedure

Respondent agrees with the statement of the procedural history of this case.

B. Facts

Although Johnson testified that his purpose in being present at Rex' interrogation on September 15, 1977, was only as an advisor to Teeples, his actual conduct went far beyond that role. Not only did participate in the interrogation of Rex, but he was the person principally responsible for securing the involuntary waiver of the right to counsel and the statements made by Rex.

The Complaint was filed on September 28, 1979, prior to the Colorado Court of Appeals first decision. That decision found that "the police took advantage of the defendant's confused mental state and deceived him into believing that he was not a suspect in a crime." People v. Rex, Colo. App. , 636 P.2d 1282, 1284 (1981). After the second decision of the Colorado Court of Appeals, the charges against Rex were dismissed.

REASON FOR NOT GRANTING THE WRIT

Virtually all of the Circuit Courts which have considered the issue have applied the advocacy/investigative or administrative distinction first suggested by this Court in Imbler v. Pachtman, 424

U.S. 409, 96 S. Ct. 984, 47 L.Ed.2d 128 (1976). See, e.g., Gray v. Bell, 712 F.2d 490 (D.C. Cir. 1983); Lerwill v. Joslyn, 712 F.2d 435 (10th Cir. 1983); and Forsythe v. Kleindienst, 599 F.2d 1203 (3rd Cir. 1979).

Such an analysis must be applied on a case by case basis. This functional analysis test was followed by the Tenth Circuit in the present case. While a delineation of how far a prosecutor may go to secure illegal or unconstitutional evidence may be useful, it appears that the Circuit Courts have had no difficulty dealing with the problem. Although prosecutors may have an interest in seeing their immunity strengthened, it is respectfully suggested that granting the

writ of certiorari requested by the Petitioner would not further the interests of either justice or the criminal justice system.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response to Petition for Certiorari has been mailed, postage prepaid, this day of September, 1985, addressed to the following:

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